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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 280

JOSEPH VOGELSANG and GEORGE SCHMITS, co-partners doing business under the firm name and style of WHITEHOUSE BROS.,

Petitioners,

—against—

DELTA AIR LINES, INC.,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

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Tariff Provision Involved

Rule 71(A) of Local and Joint Passenger Rules Tariff No. PR-4 in which respondent was a participant governed the transportation of passengers and baggage between points within the United States and was filed with the Civil Aeronautics Board pursuant to 49 U.S.C.A. §483(a). It provided, to the extent pertinent:

> "Rule 71 Limitation of Liability
>
> (A) The liability, if any, of all participating carriers for the loss of, damage to, or delay in the delivery of any personal property, including baggage (whether or not such property has been checked or otherwise delivered into the custody

of the carrier) shall be limited to an amount equal to the value of such property, which shall not exceed the following amounts for each ticket:

* * * *

$100.00 when any other carrier [including Delta] is responsible for the loss, damage or delay * * *;

* * * * *

unless the passenger, at the time of presenting such property for transportation, when checking in for flight, has declared a higher value and paid an additional transportation charge, at the rate of 10 cents for each $100.00 or fraction thereof, by which such higher declared value exceeds the applicable amount set forth above, in which event carrier's liability shall not exceed such higher declared value."

Question Presented

1. Did the Court of Appeals correctly hold that the liability of respondent air carrier for the loss of a salesman's bag of jewelry merchandise checked with it by petitioner, Schmits, was limited to $100.00 under Rule 71(A) of the carrier's Local and Joint Passenger Rules Tariff No. PR-4 lawfully filed with the Civil Aeronautics Board where:

a. the petition (page 18) concedes the reasonableness of the tariff provision permitting such limitation;

b. the loss occurred as the results of honest, but negligent, acts of the respondent air carrier's employees in delivering the bag of jewelry to an

imposter who feloniously impersonated the owner—all without any gain, benefit or profit to respondent; and

c. the passenger, one of the petitioners herein, did *not* tell the air carrier when the bag was checked that it contained valuable commercial jewelry worth $69,275.87; did *not* declare a value higher than $100.00; but rather, by his acts, and by operation of the tariff, represented and agreed that the bag had a valuation, in case of loss or damage, not in excess of $100.00.

Statement of the Case

The following facts, omitted from the Petition, are pertinent.

When Schmits, one of the petitioners, checked his bag of sample jewelry with respondent, he did *not* tell the latter's ticket clerk what was in the bag (App., p. 6a). He did *not* tell the ticket clerk the bag's contents were worth $69,275.87 (App., p. 6a). Yet he was, at the time, an experienced air traveler (App., p. 10a). He knew, as a matter of law, the contents of respondent's Local and Joint Passenger Rules Tariff No. PR-4. He knew, under Rule 71(A) thereof, that his bag and its contents, in the absence of a higher valuation declared by him, were represented by him to have an agreed valuation, in case of loss or damage not in excess of $100.00 (App., p. 84a-85a). He knew, too, that if he wanted the air carriers to accept the bags under a higher valuation, he would have to state such greater value and pay an excess valuation charge (App., p. 84a-85a). He did neither.

Petitioners' protection against loss of their merchandise was in the insurance which they carried on it. They did not need, rely upon, or want (nor pay for) the protection which would have been afforded by the declaration of a higher value to the air carrier. After the loss, petitioners' insurance company made written claim upon respondent on the grounds that it was subrogated to petitioners' rights by virtue of an insurance payment of approximately $50,000.00 (Schmits' deposition, pltffs.' Ex. 3). Now, having brought this action in the name of its assureds, the insurance company asks this Court to disregard what, in effect, was a choice by petitioners to carry substantial insurance coverage on their jewelry rather than to declare to the air carrier a valuation in excess of $100.00 and pay the carrier's charges commensurate with the greater risk assumed. Thus petitioners, through their insurance company, would have this Court ultimately hold that the valuation agreement must be set aside and ignored even though Rule 71(A) of the tariff setting forth such limitation, in the words of the Court of Appeals below, was intended:

> "to protect the airline directly, and other users of its service indirectly, from large baggage claims of the sort here presented unless the carrier was advised of the need for taking special precautions and adequately paid for their cost and the enlarged responsibility assumed." (Petition, page 26).

ARGUMENT

The Applicable Principles of Law

The transportation of petitioner Schmits and his baggage was governed by the Civil Aeronautics Act of 1938, 49 U.S.C.A. 401 *et seq.* [now the Federal Aviation Act of 1958, 49 U.S.C.A. 1301 *et seq.*]. Such statutes and respondent's filed tariffs constituted the contract of carriage. *Lichten v. Eastern Airlines, Inc.*, 2 Cir., 189 F. 2d 939; *St. Toepfer v. Braniff Airways, Incorporated*, W.D. Okla. 135 F. Supp. 671. The carrier's tariffs had the force and effect of statute (*Loudon v. Simonds Grain Co.*, 306 U.S. 516, 520), binding upon passenger and carrier alike irrespective of actual knowledge. *Boston & Maine Railroad v. Hooker*, 233 U.S. 97, 112.

Agreements for limited liability based upon an agreed valuation between passenger and air carrier have been upheld. *Lichten v. Eastern Airlines, Inc.*, 2 Cir., 189 F. 2d 939; *Twentieth Century Delivery Service, Inc. v. St. Paul Fire and Marine Insurance Company*, 9 Cir., 242 F. 2d 292; *Milhizer v. Riddle Airlines, Inc.*, 185 F. Supp. 110, affd. 6 Cir., 289 F. 2d 933. Such a valuation agreement does not exonerate the carrier from liability for loss or damage. On the contrary, once liability has been established, it sets forth the agreement of the parties as to the amount of such liability. *Hart v. Pennsylvania R. Co.*, 112 U.S. 331; *The Ansaldo San Georgio I v. Rheinstrom Brothers Co.*, 294 U.S. 494.

Parties to an interstate contract of carriage, whether it be by rail, motor carrier or air carrier, are

strictly bound thereby in furtherance of the national public policy declared by Congress to avoid illegal discriminations or undue preferences; and to achieve these ends, it has been consistently held that no theory of estoppel or tort will serve to set aside the provisions of the contract of carriage. *Keogh* v. *Chicago & Northwestern Railway Company*, 260 U.S. 156, 163; *Georgia, Florida & Alabama Railway Company* v. *Blish Milling Company*, 241 U.S. 190, 197; *Lichten* v. *Eastern Airlines, Inc.*, 2 Cir., 189 F. 2d 939, 942.

POINT I

Petitioners' claim of "wilful" and "wanton" misconduct is groundless and misleading. The bag was lost through the negligence of respondent's employees. Such negligence consisted of delivering it to one who falsely and fraudulently represented that he was the owner. Such delivery was not authorized by respondent and was contrary to respondent's established rules and regulations. Respondent derived no benefit, gain or profit therefrom. The Court of Appeals, following well settled principles of federal carrier law, correctly held that the parties were bound by their contract of carriage, including the limitation of $100.00 set forth in Rule 71 (A) of respondent's tariff.

Petitioners' claim that respondent was guilty of "intentional wrongdoing", "wanton misconduct" etc. is a preposterous and misleading distortion of this plain record. No claim is, or ever has been, made that petitioners' bag of jewelry merchandise was converted by respondent air carrier to its own use—yet the repeated assertions of "wanton", "wilful" and "intentional" misconduct are couched in phrasing calculated to suggest that such was petitioners' claim.

The record fact is that no claim was made that respondent benefited from petitioners' loss. Instead, petitioners *concede* that respondent had rules and regulations designed to prevent the type of loss herein. Consequently, the sole basis of petitioners' claim was the unauthorized acts of the air carrier's employees in permitting, contrary to their employer's instructions, an imposter to obtain, by fraud and deceit, possession of the bag without surrender of the baggage claim check. This was the same bag which had been represented to defendant as having only a nominal value of $100.00 or less. In the light of these undisputed facts, the Court of Appeals quite properly held that under settled principles of federal carrier law, the theft or misdelivery of the bag did not avoid the tariff limitation fixing the carrier's liability at $100.00.

Ironically, the petition cites with approval most of the authorities upon which the Court of Appeals upheld the agreed valuation of $100.00. To illustrate, we believe there can be no more wilful or wanton act by a carrier's employees than a theft by them independently or in collusion with third parties. Yet petitioners cite at page 8 of their petition two federal carrier cases which actually held that a theft by the carrier's employees does not preclude the carrier from relying upon a contractual limitation of liability. One of these was *D'Utassy* v. *Barrett*, 114 N.E. 786, 219 N.Y. 420, involving the analogous Interstate Commerce Act, 49 U.S.C.A. §1, *et seq.* The court there rejected the same argument advanced by petitioners here, saying at page 787:

> *"* * * It would be unjust and contrary to the policy of the law to permit the agreed valuation*

to be overthrown for the purpose of enabling the shipper to obtain a recovery in excess thereof in a suit for loss or damage on any theory of trover or conversion for loss of goods by wrongful deliveries or acts of employees for their own benefit, based, not on the wrongful misconduct of the carrier as such, but on the act of the employee. (*Rosenthal* v. *Weir*, 170 N.Y. 148, 154). The liability of carriers of goods at common law was that of insurer, and proper care and diligence were insufficient to avoid such liability. The duty was to carry the goods and deliver them to the consignee. A breach of that duty imposed liability. *The innocent mistakes of the servant in delivering the goods no less than his wilful misconduct in breach of the trust reposed in him constituted a conversion by the carrier.* (*Price* v. *Oswego & Syracuse R. Co.*, 50 N.Y. 213). But the contract in suit does not evade the liability; it merely fixes the valuation of the goods when liability is established. In an action for damages against the carrier, the shipper is bound by the terms of the contract, and it is of the highest importance that competent parties be held to the terms of their valid contracts." (Italics ours.)

The other federal carrier case cited by petitioners is *Moore* v. *Duncan*, 6 Cir., 237 Fed. 780. That case succinctly sets forth the rule that only where there is a true conversion by the carrier for its own use or benefit is the latter, as a matter of public policy, not permitted to limit its liability under the contract of carriage. It points out the difference between such acts by the carrier itself and those of its employees at page 782:

"But we assume that, if the carrier had in

> effect purposefully taken the goods or actually benefited by their confiscation or conversion, it would not be permitted, upon grounds of public policy, to limit its liability under the contract of carriage. Such, however, is not the case alleged. Actual conversion by the carrier to its own use is not charged. The allegation in the petition is not only consistent with, but, naturally interpreted, we think charges a theft from a car in transit by employees of the carrier, presumably acting, not in the latter's interest and for its benefit, but against the carrier's interest and to its injury as well as that of the shipper; for by the employee's wrongful act the carrier, instead of being benefited, is directly injured through its liability to the shipper."

Indeed, the situation presented herein is neither new nor novel. Again we refer to another leading federal carrier case cited by petitioners at page 8 of their petition, *Georgia, Fla. & Ala. Ry.* v. *Blish Milling Co.*, 241 U.S. 190. That case involved the Interstate Commerce Act and the right of an interstate rail carrier to rely upon a contract provision providing for four months' notice of claim in writing. The plaintiff, in an effort to avoid such provision, urged that the requirement for a notice of claim in the event of "failure to make delivery" should not "be deemed to include a case where there was not only failure to deliver to the consignee but actual delivery to another or delivery in violation of instructions" (p. 195). Rejecting this argument, this Court said, at page 197:

> "* * * It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties

could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. *Chi. & Alt. R.R.* v. *Kirby*, 225 U.S. 153; *Kansas Southern Ry.* v. *Carl*, supra; *A., T. & S. F. Ry.* v. *Robinson*, 233 U. S. 173, 181; *Southern Ry.* v. *Prescott*, supra."

The cases of *Lichten* v. *Eastern Airlines, Inc.*, 2 Cir., 189 F. 2d 939 and *Franklin* v. *United Airlines, Inc.*, S. D. N. Y. 184 F. Supp. 814, followed the foregoing principles. In those cases, like the case at bar, there was a misdelivery by the air carrier's employees of the passenger's bag to a stranger without surrender of the claim check. The plaintiff in each instance, attempted to set aside the carrier's tariff provisions limiting its liability for loss of jewelry in checked baggage by claiming a wrongful conversion and deviation. The Second Circuit, in the *Lichten* case, above, rejected this argument, saying at page 942:

"It overlooks, however, the far-reaching effect of the principle of uniformity of treatment, which requires that the tariff be applied to all matters arising from the attempted performance of the contract. Misdelivery is not a conversion which deprives a carrier of the benefit of a tariff provision limiting ability. *Missouri Pac. R.R.* v.

Boone, 270 U.S. 466, 46 S.Ct. 341, 70 L.Ed. 688; *Georgia, Fla. & Ala. Ry.* v. *Blish Milling Co.*, 241 U.S. 190, 36 S.Ct. 541, 60 L.Ed. 948."

See also:

Rosch v. *United Air Lines, Inc.*, D.C.N.Y., 146 F. Supp. 266;

Tannenbaum v. *National Airlines, Inc.*, (App. Term) 13 Misc. 2d 450, 176 N.Y.S. 2d 400.

The argument advanced by petitioners at pages 10 and 18 of their Petition that the term "loss" used in Rule 71(A) of respondent's tariff should be given a restricted meaning is fully answered by the opinion of the Court of Appeals below (Petition, page 26) as well as by the allegation in paragraph Seventh of their complaint that the jewelry, by virtue of the acts of defendant, "has been wholly lost to plaintiffs."

No extended discussion of Point II of the Petition is required. The observations of the Court of Appeals made with respect to the primary jurisdiction of the Civil Aeronautics Board to approve or disapprove tariffs (Petition, App. pp. 28-29) have no bearing on the case at bar. Petitioners concede the validity of Rule 71(A) of the tariff. They dispute only the application of that tariff provision to the facts of this case by repeating their prior reckless allegations of "wilful", "wanton", and "intentional misconduct". They then go on to assert (Petition, p. 18) that "the courts are primarily and exclusively qualified to make" a determination as to the applicability of the tariffs. With this we agree. That is precisely

what took place in the courts below. The District Court and the Court of Appeals both ruled that the tariff was properly applicable to the facts shown in this record. There was thus a judicial determination of the merits of this controversy in a situation in which neither party questioned, or now questions, the doctrine of primary jurisdiction.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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